MICHIGAN SUPREME COURT

PUBLIC HEARING
March 28, 2012

CHIEF JUSTICE YOUNG: Good morning. Welcome to the March public administrative hearing. We have a number of items on our agenda and several speakers who are here to address three of those items. The first of which is the Code of Judicial Conduct revision – proposals which are designed to consolidate and clarify the extra judicial activities of judges. And there is one speaker endorsed. All speakers have an opportunity to address the Court for three minutes. First is Mr. Fischer.

ITEM 1: 2005-11 – Code of Judicial Conduct

MR. FISCHER: Good morning. Lawyer of the Year – Chief Justice, Justices. The Commission is in strong favor of the proposal that it submitted as an alternative to the one that the Court has, having a clear bright line rule that judges should not be involved in fundraising period. I think that it's a much easier way of handling it. The two proposals that the Court has all have the possibility of the slippery slope – the unclear lines – can I do this or can I not do this. The one thing that is surprising is that none of the judicial organizations submitted any kind of comment. When I go around and talk to different judges' organizations and they ask questions – can I do this or can I not do this – one of the things that I say for example is he shouldn't be selling girl scout cookies because that's a personal solicitation. Oh, thank you, I don't want to sell – I don't to have to be involved in any of this. They were thrilled that the rule, at least as I was explaining how I see, would protect them and say I can tell them, no, I can't do that for you I'm sorry. On the other hand, I hear some others who would like to be more involved because they see themselves as any other – I don't want to say a politician – but because they have to get elected they'd like to be involved in whatever they can be involved with.

CHIEF JUSTICE YOUNG: How about good citizenship?

MR. FISCHER: Yes.

CHIEF JUSTICE YOUNG: Okay.

MR. FISCHER: But you know it's not a scientific survey, but I would hear far more judges who would be happier not being involved at all. So I was surprised not to see their organizations chime in. The Commission would like to say that if the Court takes one of the proposals A or B, that it consider adding something that is along the federal line that judges may solicit family members and other judges as long as they have no supervisor or public roll over the solicitees. That's an issue that pops up from time to time for us, and the Commission doesn't – but without identifying what the root problem is it seems that – that you would not want to have a judge soliciting somebody below them in terms of a jurisdictional level, but the same level or above wouldn't be a problem. Unless there are any questions –

CHIEF JUSTICE YOUNG: Thank you very much.

MR. FISCHER: Thank you very much.

CHIEF JUSTICE YOUNG: There are no other people appearing to address Item 1 – the 2005-11 so we'll turn to Item 2 which is #2010-22. It's a proposed amendment to Rule 7.3 which would limit the ability of an attorney to contact or solicit a defendant in a family law case for 14 days after the suit or until the defendant is served whichever occurs first. And there are several people here to address that; the first being Mr. John Allen.

ITEM 2: 2010-22 – MRPC 7.3

MR. ALLEN: Mr. Chief Justice, Justices, good morning. Thank you for this opportunity to speak with you. My name is John Allen, I'm a lawyer, I've practiced law for about 40 years in the state of Michigan and regularly practice family law. You have a letter from me; I'm not going to repeat the things that are in there, but there were a couple highlights I wanted to pass along to you. Probably most glaring in its constitutional deficiencies is the lack of a substantial interest empirical evidence under the second-prong of the *Central Hudson* test. There is a number of anecdotes that are passed along to you by various letters in the file, but none of them actually recite a factual instance of this and of the concern – and I think a genuine and good concern expressed by the Family Law Section for the welfare of plaintiffs who file and may be met with some illicit response to that filing when the respondent or defendant discovers it. There's simply though – however, is not actual evidence to support it and I think that would make the rule

constitutionally infirm in and of itself. Secondly, I wanted to call to the attention of the Court a Second Circuit case which was decided just a couple weeks ago – *Hayes – H-a-y-e-s v State of New York Attorney Grievance Committee*, in which the United States Court of Appeals for the Second Circuit found unconstitutional a rule adopted in New York, it is not –

CHIEF JUSTICE YOUNG: What's the cite of – excuse me.

MR. ALLEN: I'm sorry?

CHIEF JUSTICE YOUNG: What's the cite on –

MR. ALLEN: I'm sorry; I don't have a citation for it your honor. The docket number in the case is 1-0-1-5-8-7.

CHIEF JUSTICE YOUNG: 1-0 – sorry -

MR. ALLEN: And I did not have an opportunity –

CHIEF JUSTICE YOUNG: 1-0-1-5 –

MR. ALLEN: Yes. 10-1587.

CHIEF JUSTICE YOUNG: Okay.

MR. ALLEN: I apologize; I did not bring the Westlaw cite along with me. In that case, the New York Supreme Court attempted to impose disclaimers on lawyers who choose to include a recitation of board certification in their correspondence or in their marketing materials I'll call them, and the Second Circuit found that rule unconstitutional for vagueness. And I wanted to stop just a moment and call your attention to the fact that in the proposed rule solicitation is never defined. We don't know what a solicitation is. I think what they have in mind is some sort of intended contact by letter or otherwise to a defendant or respondent, but in reality it could be a conversation at a social event, it could be any number of instances in which an engagement might be intended and there is a communication to that potential client. I think that vagueness is also a serious problem.

CHIEF JUSTICE YOUNG: You think solicitation is not a term that most lawyers would understand, really?

MR. ALLEN: Well, your honor the difficulty is this. I do not worry about lawyers trying to obey these rules because I

believe most of them will, but they're more likely to see this rule not from – in a communication from the Attorney Grievance Commission - they're more likely to see it in a civil case in a motion filed by an opponent – sort of the same way that 1.7, 1.8, and 1.9 are used about conflict of interest. Lawyers don't often see those in matters before the Attorney Grievance Commission who run the disciplinary operatus. They see them in motions to disqualify and things that are brought up by opponents. And I fear that this rule may plant the seed for the same sort of use to be made.

CHIEF JUSTICE YOUNG: But because the term solicitation is unsusceptible of the common understanding?

MR. ALLEN: Well, I – I think the civil use of rule would be used in many aspects, but I think the lack of a definite definition – a specific definition of solicitation could lead to some of those problems.

CHIEF JUSTICE YOUNG: Let me – let me turn to your concern about the lack of empirical support. Would you support having the Bar conduct a study and give a report to determine whether there is any empirical basis for the almost unanimous concern at least expressed in the Family Law Section or the importuning that can result in the transfer of assets and violence, etc?

MR. ALLEN: Well, I mean not weighing my support one way or the other, but just telling you I think that's what would have to be done as a minimum in order to establish the substantial interest under *Central Hudson*. And for whatever it's worth, and frankly it's not much probably, my anecdotal inquiry to the family law lawyers I know, most of whom are in the western part of the state and also to the family law lawyers in my own law firm that number, including me, six lawyers, are that we've never experienced an instance not only of this – of the filing generating an act of domestic violence or diminution of assets, but, more importantly, we aren't aware of this trolling practice that is recited I think as the basis of concern where lawyers use some mechanism in order to go out and contact defendants who they do not know, have no other relationship, but seeking an engagement. So this may be something which is more localized I think than some practices are, and I think that's another reason why it's probably not a good subject matter for the Rules of Professional Conduct.

CHIEF JUSTICE YOUNG: Thank you.

MR. ALLEN: Thank you.

CHIEF JUSTICE YOUNG: The next speaker, Merrill Gordon.

MR. GORDON: Mr. Chief Justice, Justices. I address this Court to speak in opposition of the adoption of ADM 2010-22. I support the constitutional and ethical arguments presented by the previous speaker, Mr. John Allen, and will not – and will confine my remarks to my experience and what I believe is a lack of substantiation for the adoption of this proposal. It should be remembered that although the proposal was passed by the Representative Assembly, it was passed by a divided vote of 68 to 48 with many speaking in opposition including Elaine Fieldman representing the State Bar Ethics Committee. Arguments presented in written submission seem to address generally two areas, all anecdotally, one is the possibility of violence and the second is economic harm. No studies have been presented nor statistics offered other than those indicating generally this is what I see in my office. Mr. James Harrington who spoke before the Representative Assembly and is scheduled to speak here today could only offer as the basis for his conclusion that 100% of 13 clients – either clients or respondents, it wasn't clear – opposed such contact. I represented three times that number of clients who I've contacted – who contacted me after initial contact from a letter that I sent – fielding countless phone calls in addition to that in emails, and nearly all expressed gratitude for the chance to consult with me or retain me to represent them - this quick access to public record information placing them on more of an equal footing with the opposing party. All of the ills complained of – addressed by the –

CHIEF JUSTICE YOUNG: May I ask a question?

MR. GORDON: Yes, sir.

CHIEF JUSTICE YOUNG: How do you find out that there is somebody who may need counsel?

MR. GORDON: I'm able to obtain that information from the clerk's office at this point in Oakland County, sir.

CHIEF JUSTICE YOUNG: Is that what's referred to as trolling?

MR. GORDON: I don't know what's referred to as trolling, sir. I – that's not a term I would use. Others have used that and I don't know that it's been defined. I think it's a

derogatory term and much the same as I've heard others called ambulance chasing.

CHIEF JUSTICE YOUNG: Okay. I understand.

MR. GORDON: I apologize your honor. The ills complained of can be addressed with proper pre-suit planning by counsel, and precautions by litigants which, if necessary, would be necessary regardless whether they received a letter from me or another individual or were contacted by a process server at the door for the first time at their home or their workplace. That pre-suit – either pre-suit or planning needs to be done by both litigants and attorneys. Initiating parties should not be given what is essentially a free pass pre-suit and 14 days post-filing to themselves remove children and or money without consequences. I represented many individuals who have – would have been seriously disadvantaged but for early notice of the proceedings. Not everyone has easy access to counsel and broader market advertising is not and should not be restricted. The type of – the type of contact sought to be restricted here allows smaller firms and sole practitioners to affectively offer legal services to those in need of such legal services. It was just such a letter that brought a U.S. Marine to me who was in Michigan on leave from Hawaii. He had filed for divorce in Hawaii for custody – and custody proceedings before he could have his wife served here in Oakland County – she was avoiding service – she was here with the child. She filed for divorce here. Had it not been for the information that I was able to provide him, his wife may have been successful in wrestling custody away from him notwithstanding the prior filing. Judge Sosnick in Oakland County ceded jurisdiction to the Hawaiian court in that situation. In closing, I believe that this speech generally and commercial speech in particular should be restricted as little as possible. This type of speech regarding – again should be restricted – particularly based on only what is anecdotal and law office survey. ADM 2010-22 should not be adopted by this Court. Thank you very much.

CHIEF JUSTICE YOUNG: Thank you very much. The next speaker, James Harrington.

MR. HARRINGTON: Good morning. Mr. Allen and I were classmates together so we've been out there about the same amount of time. Ninety percent of what our office does is complex and high conflict family law cases. I was here at the beginning when this problem arose on Family Law Council. The tactics of culling circuit court files and immediately

soliciting a representation started about five years ago, and it is very prevalent in Wayne County and Oakland County. I don't think it needs to be prevalent state-wide to garner your intent scrutiny as to what's going on here in the process. If I had dead bodies to talk to you about who were killed, we would be too late. We're your boots on the ground; we are your family law lawyers. We know what's going on out there and we have spent five years culling this proposal which initially was much broader. Initially, the thought was well why is family law special – let's apply this to all cases. And we became convinced that family law is special because of the children and because of the risk of domestic violence and because of PPOs. So we narrowed it to family law cases. We also thought that 30 days would be appropriate under the *Florida v Went For It* case – which was upheld by the Supreme Court - which banned solicitation in auto accident wrongful death cases – and we narrowed that too. We worked with the State Bar Representative Assembly for over two years to garner a carefully crafted proposal which would specifically target the problem that we have. And because it specifically targets that problem, this proposal is supported by the State Bar of Michigan, the Michigan Judges Association, the Domestic Violence Section of the State Bar, and, of course, the Family Law Council. One of the suggestions that's been made is that let's – why don't we just make all domestic relations files confidential. At Council level, we declined to go that route because of the obvious cost to the county clerks. When I looked yesterday and did some fresh research, *Burkle v Burkle* is a California case, and I will email the cite up to the Court, it is 37 Cal Rptr 3d 805, where there's a whole host of constitutional issues about right of access to public files and public records. And the attempt to keep family law files confidential or financial information associated with family law files was held to be unconstitutional in California. So it's one thing to say there are alternate means, but there may be more constitutional issues associated with that kind of approach about sealing files than there is to have a modest 14 day or a proof of service. There's been no constitutional interest asserted on behalf of our – our desire to go ahead and solicit these persons right away other than commercial free speech. And as we know –

CHIEF JUSTICE YOUNG: A pretty significant one.

MR. HARRINGTON: Yes, sir?

CHIEF JUSTICE YOUNG: That's a – that's a pretty significant constitutionally recognized zone.

MR. HARRINGTON: That is very true, but it is subject to limitations. And the Supreme Court authorized those limitations in the *Went For It* case.

CHIEF JUSTICE YOUNG: Well, the *Went For It* case is pretty distinguishable from what we have here in terms of the factual predicate for it. There's a pretty thin evidentiary record in this file as far as I can see to support the – what I think would be a substantial state interest in protecting people from having their assets seized and domestic violence. But you agree there isn't much here in terms of actual sort of evidence that that's the true – that's the case.

MR. HARRINGTON: I think a letter – first of all, we did not conduct a survey. And would –

CHIEF JUSTICE YOUNG: Don't you think that would be a prudent predicate to support this – under *Went For It*?

MR. HARRINGTON: It would be a rational predicate, but I don't see it as the condition precedent. In personal injury cases you're not dealing with personal protection orders, you're not dealing with –

CHIEF JUSTICE YOUNG: I understand that, but in *Went For It*, what was the evidentiary record that the Supreme Court relied on to support the limitation on commercial speech?

MR. HARRINGTON: A survey, that is correct. And I –

CHIEF JUSTICE YOUNG: And a fairly substantial one.

MR. HARRINGTON: I'm sorry, your honor?

CHIEF JUSTICE YOUNG: A fairly substantial one.

MR. HARRINGTON: It was a –

CHIEF JUSTICE YOUNG: There is no such thing here.

MR. HARRINGTON: I don't believe that this Court makes court rules – or should make court rules based upon surveys.

CHIEF JUSTICE YOUNG: May be so, but it seems to me *Went For It* does seem to require some kind of evidentiary support for a limitation on commercial speech. You disagree with that?

MR. HARRINGTON: I would not disagree with that.

CHIEF JUSTICE YOUNG: All right. Well, then tell me why you think the record before us today is sufficient to sustain that burden.

MR. HARRINGTON: Absolutely, your honor. We have 2,600 members of the Family Law Section, and the Family Law Council of 21 members speaks for every one of those members. And that Family Law Section has unanimously –

CHIEF JUSTICE YOUNG: We've just heard from a couple.

MR. HARRINGTON: The Council that represents the Section and Mr. – Well, we unanimously at Council level support this, the Michigan Judges Association supports this, the Domestic Violence Section of the State Bar of Michigan supports this, and the State Bar of Michigan supports this. Would we like to have a survey to put in front of you, yes, we would. We don't have –

CHIEF JUSTICE YOUNG: Then why don't you?

MR. HARRINGTON: I'm sorry, your honor?

CHIEF JUSTICE YOUNG: Then why don't you?

MR. HARRINGTON: Because we have not conducted a survey at this level.

CHIEF JUSTICE YOUNG: Okay. Thank you. Any other questions?

JUSTICE MARKMAN: Can I ask one question? Why am I wrong to be concerned that if we were to enact an amendment of the instant sort that would do nothing at all to limit solicitation occurring via TV, radio, and billboards during that 14-day period, and in the end what this would do largely is to benefit one group of attorneys while handicapping another group of attorneys?

MR. HARRINGTON: I think the answer to that is clear that the constitutional access to legal counsel is, in fact, protected by the ability to advertise on radio and TV, but the targeting of a specific individual who has been sued for divorce is not gonna flow from the television or commercial advertising, and nothing in this would inhibit or protect or impair commercial advertising.

JUSTICE MARKMAN: So you think a distinction can be drawn between a direct solicitation and a more general solicitation, and because we can't do anything to limit the general solicitation we should focus only on specific solicitations.

MR. HARRINGTON: This is a very narrow – Yes, your honor. This is a very narrow target of recipients of direct communications. I'll give you an example that I had to deal with last week. I have a couple who want to wait until June to tell their kids about a pending divorce case, and they have agreed they're not gonna tell the kids about the pending divorce case. But I have mom picking up the mail every day over the next two months to make sure that there's not some letter coming in that her teenage children will open or otherwise generate a discussion as why are we getting this letter from lawyers – why is this happening – and that's a specific example from my practice.

JUSTICE MARKMAN: I don't doubt that a more specific limitation can often be a more effective solicitation, but there's certainly some number of people who will be susceptible to a more generalized kind of solicitation – precisely the kind of solicitation that you would see through mediums of mass communication and those attorneys that purvey in that kind of solicitation will be protected during the 14-day period and those attorneys who rely upon the more specific solicitations will be impeded during that period. Should I be concerned about that? Is that -

MR. HARRINGTON: I don't believe you should be concerned because there is no risk to a particular defendant where the process server is about to serve a personal protection order on them that this individual out there is gonna realize the process server is attempting to protect human life and protect them from violence.

CHIEF JUSTICE YOUNG: Wasn't the point that until such time as the defendant knows that there is a suit a general solicitation would not be perceived as relevant to them? They don't know they have a – a legal issue at that point.

MR. HARRINGTON: That's correct.

CHIEF JUSTICE YOUNG: All right. Thank you.

MR. HARRINGTON: Thank you.

CHIEF JUSTICE YOUNG: The next speaker is Carol Betimeyer. What is it? Breitmeyer, sorry.

MS. BREITMEYER: Good morning. I've practiced family law for approximately 25 years and I sit on the Family Law Council and I also sit on the Character and Fitness Committee for the State Bar at the standing level and have for more than a dozen years. I'm here as a proponent of the amendment, and I want to address the issue that you're very interested in first. And Justice Young you hit it just right. Of course, the targeted mailing that occurs on the day of the filing of the divorce delivers two messages to the defendant. One, you're being sued before he or she knows about it, and then, two, please use me as your lawyer. Whereas, the general solicitation – advertising, etc. – doesn't, of course, deliver the message to the personal defendant that you're being sued – just use me if you happened to get sued. In my opinion, why the balancing act is not as difficult as it might first seem is because, in fact, what the targeting mailing on the day of filing attempts to do is to exploit the elements of surprise. And that is not about – that is not what the solicitation that we approve of constitutionally is about. It's not about exploiting surprise, it's about permitting commercial speech, permitting people to advertise in this fashion. The exploitation of that surprise is what the targeted mailing causes to happen, and that is not necessary for the targeted mailer to enjoy the benefits of advertising. A 14 day or less waiting period merely differs slightly their ability to garner clients, and it in no way, in my opinion, does it generally affect – genuinely affect their ability to get clients.

CHIEF JUSTICE YOUNG: I'm at least somewhat persuaded that if there is domestic violence and manipulation of assets that can go on here before a court has provided for how these matters - at least the financial matters – could be handled, that at least expresses an interest which I think the state has the right to be concerned about and arguably protect. My concern is I don't think there's a factual predicate that has been made to sustain the limitation on the commercial speech here.

MS. BREITMEYER: Yeah. I've heard your inquiries about the – about the perhaps the necessity of doing a survey. And if the survey were to –

CHIEF JUSTICE YOUNG: Well, let me just ask you. Do you think this Court in the very general sort of exhortation in

support of this is the kind of record that the United States Supreme Court has recognized?

MS. BREITMEYER: You know Justice, yes, I do, but it is more because I don't believe that any genuine negative impact is going to occur to those who are soliciting the business.

CHIEF JUSTICE YOUNG: Wait a minute. It is a limitation per se if I am prohibited from making contact with a potential client who has a legal matter pending against them until 14 days have lapsed or until they're served. That's a limitation right off the front, right?

MS. BREITMEYER: Well, is it a limitation – it is a limitation on when you can mail the solicitation, but if the object of the solicitation is to obtain clients, there is no evidence that they're going to be less successful in obtaining clients because they must wait three or four days in most instances while the ex parte orders are being signed by the judge. So, yes, it is a limitation, but does it have an affect that actually limits their ability to get clients – I don't think it does. And they certainly have no evidence –

CHIEF JUSTICE YOUNG: Wait a minute. I mean being told you've been sued by your wife and you didn't know it is a pretty – pretty powerful piece of information. I might be very grateful to the person who told me that.

MS. BREITMEYER: Indeed. Indeed, it is, but is that – the other balancing act – aspect is, of course, the interests – the great compelling interest that the state has in protecting families and children. And we can tell you that this does negatively affect the order of transition from being a married family to being a divorced family.

CHIEF JUSTICE YOUNG: That's the part I don't see if the –

MS. BREITMEYER: Okay. This is something that a divorce practitioner would – every single one of us would agree - the crucial element of creating the exit plan – it's one of the first things you talk about with your client. How are we gonna do this? How are we gonna get your husband or your wife served and will you be safe? Should you be off-site when it happens? Should you be with a friend when it happens? We rarely use the process servers – at least in my practice. It's about orderly transition from being divorced to being separate. And protecting those children, of course, is paramount to the

practitioner as well as to the state of Michigan. And this is where I am deeply concerned about the impact given the countervailing interest which I think is minimal. And I thank you and hope that you'll consider our proposal.

CHIEF JUSTICE YOUNG: Now the last speaker on this topic is Lori Buiteweg.

MS. BUITEWEG: Good morning, Chief Justice and Justices. Lori Buiteweg. I am an attorney in Ann Arbor, Michigan with 21 years of experience – 11 exclusively in family law. I've been a Fellow of the American Academy of Matrimonial Lawyers for 3 years. I've sat as chair of the Representative Assembly in 2005 and 6, and I'm currently a State Bar officer. I come here today because I believe that we need to have the amendment to MRPC 7.3 in order to protect the public from harm and from the potential for confusion. This issue came to my attention in – at the end of my tenure as chair of the Assembly in 2006 when a lady came in to speak with me for a divorce consultation and presented me with this packet which says in bold print your spouse has filed for divorce. This case has been filed with the clerk of the Washtenaw County Circuit Court. And then it goes on to explain about how all the terrible things that their spouse's lawyer is going to do to them if they don't hire this person to represent them. This lady came to me because a friend of hers had recommended me. She wasn't sure she was allowed to retain me. She was confused and thought that somebody – that the court had appointed a lawyer for her and that this was that lawyer. She had called the lawyer, she didn't particular care for the lawyer. She was worried she owed the lawyer money, and she was worried that she was going to get in trouble for speaking with me. It took me quite awhile to get her situated and squared away and to let her know she didn't have to retain this lawyer and that she did need to retain a lawyer. I then went to lunch and spoke with my five partners, between all of us we've had literally thousands of cases involving family law, and their alarm and concern over this type of direct solicitation was uniform and over the top. We all put safety plans in effect, as one of the speakers said, for our clients, and I think the reason that evidence might not show harm having been done is because good lawyers work very hard at safety plans for breaking this news to the other spouse. And now that we know that "trolling" is happening, we're doing an even better job of that. We're taking this into consideration when we advise our clients. Younger lawyers, more inexperienced lawyers, may not do that. I don't want this to be the case of the train crossing where we could for free put up a protected crossing – it will cost us

nothing. And when we take an oath, it's not to take a case for lucre. Our obligation as lawyers is to protect the public – that is our first obligation. And so I would like to see us put up this train crossing. It's free, it only puts a bond for 14 days, and it allows the court rule for service that we already have to be effectuated and not undercut or overridden or end-around it by lawyers who are looking to make a buck off somebody who is very vulnerable.

JUSTICE MARKMAN: Ms. Buiteweg?

JUSTICE MARILYN KELLY: I have a question. What other states have a rule like this?

MS. BUITEWEG: My understanding from reading the RA transcript from March 2010 is that there are two other states that have a rule like this. I'm sorry, your honor, I have not updated my information since reading that transcript.

JUSTICE MARILYN KELLY: With respect to those two other states, do you know whether a survey was done prior to the enactment of the rule?

MS. BUITEWEG: I do not, but I would be happy to follow up if it's appropriate and send a letter to the clerk and find out.

JUSTICE MARILYN KELLY: You can hear that there's concern about the need for some further substantiation because of the freedom of speech concern here. What's your specific response to that?

MS. BUITEWEG: My specific response to that is that implicit in the RA's vote in March of 2010, I think is the reality that many of those lawyers who voted in favor of this proposal have either seen situations where this would have been harmful if they hadn't had a good plan in place or they did see situations where it was harmful and they simply voted yes for it without coming to the microphone and saying so. My other response to that is that if a survey were to show that there hasn't been anybody actually harmed at this point, that that could be because of the higher level of awareness we have of this with experienced practitioners and that we are advising our clients to assume that their spouse is going to find out within 24 hours of the complaint being filed. We are having to manipulate the way that we do things to avoid this sort of thing from happening, and I'm just worried that a less experienced lawyer won't be aware of these types of letters and that

somebody will fall victim. It's just too high a risk to take and it's not necessary – 14 days restraint isn't that long – and there's all kinds of other forms of advertising. Yes, lawyers need to be entrepreneurial and we need to market – I'm absolutely all for that – we just don't need to do it at the expense of children that could get caught in the middle.

JUSTICE MARKMAN: Ms. Buiteweg did I hear you correctly in describing this as a threat solicitation? Is that -

MS. BUITEWEG: Direct. I'm sorry.

JUSTICE MARKMAN: Oh, direct. Okay.

MS. BUITEWEG: I slurred my words. Direct.

JUSTICE MARKMAN: Okay. I'm sorry. I misheard you. But my question is is there someway that this could be cast in the most narrow possible manner so as to assure its constitutionality by somehow separating the solicitation per se from the nature of the substance of the solicitation. In other words, isn't the problem with the specific kind of language in the solicitation you've just shared with the Court as opposed to the solicitation per se? Is there something that can be drawn more narrowly to focus on that kind of language as opposed to any and all solicitations during this period of time?

MS. BUITEWEG: Right. Well, it is clear from the *Shapiro v Kentucky* case, 486 U.S. 466 (1988), that we do need to have any restrictions on direct solicitation to be directly towards the protection that you're actually trying to enhance.

CHIEF JUSTICE YOUNG: The question is is the content of this one a problem or is there – the fact of it a problem. You've drawn attention to this was a particularly ugly and misleading one.

MS. BUITEWEG: Okay.

CHIEF JUSTICE YOUNG: I think there are rules already that prohibit misleading solicitations.

MS. BUITEWEG: Right.

CHIEF JUSTICE YOUNG: So you've emphasized a point that I think is already covered by the rules and maybe this lawyer went beyond what was appropriate in casting this solicitation.

MS. BUITEWEG: Right.

CHIEF JUSTICE YOUNG: So are you focused on the content or are you focused on the fact of the solicitation?

MS. BUITEWEG: Well, I am focused on the fact of the solicitation and the content, and would have no objection to a rule that clarifies or distinguishes –

JUSTICE MARKMAN: Well, what would a rule say that sought to focus on the content? In other words, is this a misleading solicitation in the first place? It seems to be saying something that's true as far as I know. Would we have any authority to prohibit a true – the communication of something that's truthful and accurate in the form of solicitation if it seems to be rude or instigating in some sense?

MS. BUITEWEG: No. I mean – No, as long as it's truthful, we certainly don't have the –

CHIEF JUSTICE YOUNG: Why are you focusing on content then – this rule does not address content, does it?

MS. BUITEWEG: I'm focusing on content because – you're right your honor, it's the – it's the mere fact of the communication –

CHIEF JUSTICE YOUNG: All right. It may be emblematic of difficulties that occur –

MS. BUITEWEG: Right.

CHIEF JUSTICE YOUNG: in these solicitations, but the rule doesn't address the content. I think we have ethical rules that preclude lawyers from giving the impression that they are appointed or that you must contact them – all those things that you've sort of intimated. I – my concern is, as I've said all along, I just don't think the record is sufficiently clear that there is a problem, that this anecdotal suggestion in the letters, but I'm concerned that they're – you know the fact that the Assembly voted for it is not evidence of the kind I think the Supreme Court and *Went For It* and other cases have looked at.

MS. BUITEWEG: It could be, we may just not know that. If I may address Justice Markman's question about the pinpointing

the restrictions. One of the suggestions that was made at the Assembly meeting was that this is too broad because it applies to all DV cases – or to all divorce cases and not just cases involving domestic violence. And – so the suggestion was that we should require that solicitors prescreen the cases to ensure that they do involve issues of domestic violence before they can be restricted from sending out the letter, and that is a possibility. However, my concern about that type of restriction would be that under the court rules what is in a complaint for divorce is proscribed and going over into issues that involve domestic violence which would be placed in a personal protection order in a separate matter wouldn't show up in the complaint for divorce. So there would need to be some sort of way for solicitors to check all of the files for related files on these parties to make sure that there is not a PPO matter pending. That might be something that would be very helpful to require before you send this out if there's a PPO pending this kind of solicitation can take place. That might be an option.

JUSTICE MARILYN KELLY: Is it your concern that the existing rules of ethics are not adequate to protect the public from the abuse that you're – that you're directing our attention to?

MS. BUITEWEG: It may be that the rules are sufficient and that it's an enforcement issue. I'm not sure –

CHIEF JUSTICE YOUNG: Did you refer this lawyer to the Bar – to the grievance –

MS. BUITEWEG: I did not.

CHIEF JUSTICE YOUNG: Hmmm. Do you have an ethical obligation to?

MS. BUITEWEG: I believe that it's in my discretion whether to do that or not, and I in my discretion did not do that.

JUSTICE MARKMAN: Would you have any trouble with the solicitation if it was outside the 14-day period?

MS. BUITEWEG: This particular one because of its content I would, but in general, no.

JUSTICE MARKMAN: Well, but – but that's what I was trying to focus –

MS. BUITEWEG: In general, no.

JUSTICE MARKMAN: on earlier, what is it about the content that would cause you if this were solicited or communicated outside the 14-day period to say there's something wrong with this?

MS. BUITEWEG: It –

JUSTICE MARKMAN: What would cause you to say that?

MS. BUITEWEG: It wouldn't. It is the fact of the direct solicitation that would cause me the concern. Whether we would need to dictate what could be in these letters so that we can avoid the possibility of the content being problematic.

CHIEF JUSTICE YOUNG: Really? So now you want to invade more into the content.

MS. BUITEWEG: No, your honor, I don't

CHIEF JUSTICE YOUNG: I'm really troubled. You say this is an unethical – the – your client was completely anxious – the nature of this – and yet you didn't feel any obligation to – did you call the lawyer.

MS. BUITEWEG: No, your honor, I did not call the lawyer.

CHIEF JUSTICE YOUNG: Well, what's the – what is your obligation – we're a self-policing profession, aren't we?

MS. BUITEWEG: Yes, we are your honor. I checked – I read the *Shapiro* case. My belief after reading the *Shapiro* case was that this lawyer had not done anything illegal –

CHIEF JUSTICE YOUNG: Okay. Well, that's fine.

MS. BUITEWEG: And so –

CHIEF JUSTICE YOUNG: If you - if you've determined that it falls under an ethical communication, then I'm not sure why you made the content the subject of your remarks.

JUSTICE MARKMAN: So your view is this Court should have no concern about that communication other than that be communicated in a timely manner, and that timely manner is outside the 14-day period.

MS. BUITEWEG: Right. I mean my primary concern is for you know the people who are at risk for their personal safety, their physical safety, and for the children whose emotional safety is at risk. You know oftentimes there are children witnessing arguments between parents and when this information is conveyed that's going to be a blowup – the (inaudible) in the divorce process is the moment of finding out through service that there is going to be a divorce, that's when the children are at most risk for emotional harm. It's very difficult to layout a plan for how and when to inform the children when this type of a solicitation can completely undermine all the best efforts of good lawyers to make sure that the family's not damaged or is damaged as little as possible in this process.

JUSTICE MARKMAN: I mean I guess we're just trying to focus on whether or not there's something troublesome per se in a communication that initially apprises an individual you know by the way you're being – you're sought to be divorced – as opposed to a communication that just says either within the 14-day period or outside the 14-day period you know if you ever need an attorney you know I do family law matters and keep me in mind.

MS. BUITEWEG: I wouldn't not have a problem with a communication like that after the 14-day period.

JUSTICE MARKMAN: So I guess we're trying to focus what is wrong with the former kind of communication with which you do have trouble, and what if anything should this Court do about that? Is there something wrong with the attorney saying you may not know it, but you're gonna be – a divorce proceeding's gonna be initiated against you tomorrow.

MS. BUITEWEG: The lawyer filing the case just needs an opportunity to safely navigate their client and the children through the informative moment. They just need that window of opportunity to do that safely and then advertise, market, however you want, but we need a window here in which to work to make sure that this information is conveyed in a safe way.

JUSTICE ZAHRA: Is it fair to say that the factor weighing most heavily in favor of this is that there's need to allow for entry of ex parte orders – there's need for time – and that's what you're really looking for.

MS. BUITEWEG: Thank you your honor, yes, that's what we're looking for.

JUSTICE ZAHRA: Okay. If that's the case, then why 14 days?

MS. BUITEWEG: Perhaps it could be less. Some judges are very quick with their turnaround on ex parte orders; others are very hesitant to give them out and want to send it for a hearing. In my county you can't get a hearing in less than two weeks right now under local court rule. So two weeks is as soon as I would be able to get in for a motion if my ex parte order were denied and I were required to go and actually have some testimony about why it was urgent to –

JUSTICE ZAHRA: Two weeks for the hearing if it's denied – or two weeks for the actual initial application for the –

MS. BUITEWEG: The date of filing your honor.

JUSTICE ZAHRA: Many judges in your county want to have a hearing as opposed to reading the pleadings and making a decision off the pleadings?

MS. BUITEWEG: Sometimes the judge won't allow an ex parte order without a hearing. Some judges are more liberal about ex parte orders than others. So if a judge were to deny an ex parte order then I would have to wait two weeks to get a hearing in my county at this time.

CHIEF JUSTICE YOUNG: Thank you very much.

MS. BUITEWEG: Thank you your honors.

CHIEF JUSTICE YOUNG: We then move to the last item for which there are speakers. Item 4 – Proposed Amendment to Rule 7.210 and 7.212 – which consider whether to adopt the amendments of those two rules that would extend the time period within which parties may request that a court settle a record for which a transcript is not available and clarify the procedure for doing so. We have three speakers. The first of which is Jacqueline McCann.

ITEM 4: 2010-26 – MCR 7.210

MS. McCANN: Good morning your honors. Jacqueline McCann on behalf of SADO. We wrote to the Court on March 1st in support of the amendments and I just wanted to add a few comments in addition to that. This does come up rarely you know probably

only a few percentage of cases for us and it's usually a missing portion as opposed to an entire transcript. But when it comes up, it's basically kind of a nightmare for us because we're outside of the purview of the 14 days, and then even when the judge – the trial court judge wants us to try to follow the rest of the rule it's difficult because it's difficult to rely on the client if you can't get ahold of counsel or the prosecutor. The Appellate Council Section has made some suggestions in their letter of March 21st as well and we don't have any objections to their suggestions. So we would ask the Court to adopt the proposal. There is - probably the next time the Court's gonna see this in a criminal case - there is a case on the April docket of the Court of Appeals where somebody forgot to turn the switch through the prosecutor closing, the defense closing, and part of the prosecutor rebuttal. It is a non-SADO case so I don't know the specific facts beyond what I read in the brief, but it will give you an example of sort of the nightmare of trying to recreate this.

CHIEF JUSTICE YOUNG: Thank you very much.

MS. McCANN: Thank you.

CHIEF JUSTICE YOUNG: The next speaker is Liisa Speaker.

MS. SPEAKER: Good morning your honors. Regarding ADM 2010-26, the Council fairly struggled with this proposed amendment. We do believe that the proposed amendment is definitely an improvement on the existing rule. The struggle that we had was more to do with that there's inadequacies in the current rule and the proposed amendment doesn't resolve all the inadequacies and that was the purpose of our letter. We didn't even provide proposed language because we had so much difficulty with the topic and spent a lot of time on it. I think the Council would be willing to work with this Court if the Court is at some point thinking about maybe just reworking the entire rule. We're definitely willing to work with this Court on – in that endeavor. If I could your honor, I intended to reply as to 2010-25 also and I did not do so. Can I use the last few seconds of my time to make a comment about that ADM?

CHIEF JUSTICE YOUNG: Sure.

MS. SPEAKER: Thank you your honor.

CHIEF JUSTICE YOUNG: And that is – just for the record – concerns the proposed amendment of 7.210 – whether to adopt a

proposal to amend that rule that would require trial courts to become the depository for exhibits offered into evidence instead of returning the exhibits to the parties and requiring them to submit those when the case is filed in the Court of Appeals.

MS. SPEAKER: Yes, your honor. And specifically the proposal divides it between documentary exhibits and other types of exhibits which can be returned. So the proposal is not asking the courts to keep weapons or turbines or all different types of you know the dress with the stain on it in their system. But the comment I wanted to make about this, the Council strongly supported the proposal and not just because it makes the job of an appellate practitioner easy in trying to discern and acquire the record, but because it ensures the integrity of the record that is transmitted to the Court of Appeals. And we believe that the proposed amendment along with our own amendment that we provided with our comment of 2.518 ensures the integrity of the record that is received by the Court of Appeals.

JUSTICE MARILYN KELLY: We're told that many judges are concerned about this proposal because of the space that would be required to keep this volume of information – or material in the courthouses. Are you aware of that concern?

MS. SPEAKER: Yes, your honor, I read some comments about that. First of all, the courts are only required to keep the documentary exhibits until the time for a claim of appeal is filed, and then after that time –

CHIEF JUSTICE YOUNG: Doesn't this require somebody to keep track of all those deadlines? It requires them to keep – we're having problems in many of our courts in managing the actual court files much less exhibits that you would like to add to that burden. Tracking – all these things are costs – storage.

MS. SPEAKER: There is – there is some cost to it your honor, but it – we believe it's outweighed by the integrity of the record that will be sent and by the fact that the documentary exhibits are only being kept by the trial court until the time has passed to file a claim of appeal and if a claim of appeal is filed until they send the record.

CHIEF JUSTICE YOUNG: This is a workaround because lawyers aren't doing their ethical responsibility to maintain the files, right?

MS. SPEAKER: That's quite possibly true with some attorneys. As an appellate practitioner coming into a case, sometimes it's very difficult to obtain all the documents. And even when we have all the trial exhibits, we don't necessarily know that we have the one that was actually submitted. Sometimes the ones you know that are submitted to the court as an exhibit have markings on them and so if that's what we're providing to the Court of Appeals we have no way of knowing with certainty that we have the right thing. One idea that occurred to me and this was not discussed by Council, but in many jurisdictions – and even here in Michigan with depositions – the court reporters are the ones that assemble when they do the transcripts they attach the exhibits that were submitted with the transcripts and I've actually seen that in a couple of my own cases here even though it's not a requirement from a trial in Michigan, but that is one way of potentially making the trial clerk's job easier if you only have to worry about the exhibits when the point that the transcript's ordered.

CHIEF JUSTICE YOUNG: But that's – but that's the point. Between the point of the conclusion of the trial and until such time as the court has knowledge that there's going to be an appeal it's a fairly – not only is it – that at the time discrete, but there's a lot of things that trials have happened and somebody has to keep track of that whether it's the court clerk or the court reporter and there'd have to be a warehouse in between, right? The only way the court reporter can maintain and assemble them is if somebody maintains them discretely in case this case is appealed.

MS. SPEAKER: Yes, your honor, and the trial court also is the depository for all pleadings and they keep track of all pleadings and send them to the Court of Appeals when there's an appeal.

CHIEF JUSTICE YOUNG: Yes, right, that's a court record.

MS. SPEAKER: Well, so are the trial exhibits – they're part of the record on appeal. So I – I understand the concerns that have been raised, but I think there really isn't enough of a distinction with trial exhibits that have been made part of the record to have them returned to counsel who may disappear, may not be cooperative with the later appellate attorney, and when the appellate attorney has no way to know with certainty that what the appellate attorney's providing to the court is actually the correct documents, and to ensure the integrity of the record on appeal. Because the record on appeal with those –

that part of the record, the trial exhibits is coming from the attorneys not from the trial court. And I would think that the Court of Appeals would want to know that they're getting the right thing and they're only gonna know that if it's coming from the trial court.

JUSTICE MARILYN KELLY: The argument's made that few cases are appealed as compared with the number that are resolved in the trial court. It's true also that a higher number are appealed in criminal areas than in the civil area. Have you any thoughts to whether this might be a more appropriate rule for criminal cases than civil cases?

MS. SPEAKER: Certainly, it would be appropriate for criminal cases, but there are enough civil cases and the same issues arise – maybe not to a constitutional extent like they are in the criminal context – that we believe that the rule should be the same for all types of cases. And the time to file an appeal in the Court of Appeals is 21 days. Yes, the trial may happen some time earlier because sometimes it takes the trial court months to issue its opinion and order and get a final judgment and what not, so there is, I grant, as Justice Young intimated there is some delay sometimes between the trial and the time that an appeal is filed, but an appeal from a final order must be taken within 21 days and so once that time has passed the trial court's obligation is done with – for all of those cases that haven't been appealed.

JUSTICE MARY BETH KELLY: But your argument has many assumptions. For one, that there is a court reporter. We have many trial courts that are video courts. There is an elected official in most courts who is the clerk. Many of those persons have responsibilities for the exhibits. And can you comment on how a system could be put in place given the various responsibilities of those persons – who is it that would actually be responsible?

MS. SPEAKER: Well, under the proposed rule it's gonna be the clerk's office and I would like to reiterate that my idea about the court reporters was not discussed by Council and so there could be many flaws with it especially in the context that you just raised where there might be a video recording only and not an actual person in the courtroom. So I definitely grant that that is something that would need to be further explored. But with the proposed rule, it's the clerk's office. The trial court – the judge – sends the exhibits to the clerk's office once the judge learns that an appeal has been filed so those

become part of the official record for the appeal that will eventually be sent to the Court of Appeals.

CHIEF JUSTICE YOUNG: You – this rule apparently despairs that with any degree of probability, lawyers are going to do what they are ethically required to do under the current (inaudible) – that's right – isn't that right?

MS. SPEAKER: Yes, your honor, but –

CHIEF JUSTICE YOUNG: Have you thought about anything that might help reinforce with the lawyers that they have obligations with respect to these exhibits?

MS. SPEAKER: Yes, your honor. One rule was proposed to this Court – I believe it was on the January agenda of the administrative hearing – that requires attorneys in criminal defense cases to maintain the records for five years. That, of course, only applies to criminal cases and does not affect the civil cases. And I would like to defer if I could I think Mr. Mittlestat is gonna be speaking in a little bit – I think he might be able to share some comments with you about the problems that he has faced in his office in obtaining records where attorneys don't do the job they're supposed to do. And I do under – yes, I agree, what we are talking about is situations where attorneys are not doing the job or attorneys have disappeared or where there are records – they have everything, but the flurry of the trial is so intense and what they have is an entire mess – everything's unorganized and papers are all over the place – I mean –

CHIEF JUSTICE YOUNG: Then you – you think the courts are gonna do a better job than that, right?

MS. SPEAKER: Yes, your honor. And – the point with our Section's comments I mean in my own experience there's only been a couple of times where I received a record where the exhibits are all nicely put together and in order. I mean it's just so rare it's like I want to sing Halleluiah every time it happens and it doesn't happen very often. Usually it's really trying to figure out what were the exhibits and I can't even start to do that until I get the transcript, and then I'm trying to figure out from the transcript what the exhibits are and then trying to locate them. It's much more daunting of a task than I think the court rule reflects.

CHIEF JUSTICE YOUNG: Thank you.

JUSTICE MARILYN KELLY: In a case where a – in a criminal case where the defense counsel fails to retain exhibits he should retain and the defendant finds counsel for appeal and that counsel learns that the exhibits needed are gone, what satisfaction would it be to the defendant to be able to bring the – his trial counsel up before the Attorney Grievance Commission for failing to keep the exhibits when, in fact, the loss of the exhibit can't be remedied through that or any other action?

MS. SPEAKER: It doesn't help the situation your honor, and that's why having the trial court hold on to those exhibits until the time that the claim of appeal has been filed prevents that situation from happening. We don't have to worry about those cases where the exhibits are actually completely gone. I mean my examples have been where it's hard to discern that you have the correct exhibits. But in your example, the exhibits maybe have completely disappeared and there's no way to know what they were. And, hopefully, the prosecutor in your example would have them or somebody would be able to reproduce those exhibits. But if there was a situation where the exhibits are gone forever, a grievance is not going to cure the person's criminal conviction.

CHIEF JUSTICE YOUNG: Nor would this rule. If the court destroyed them, you have the same problem.

MS. SPEAKER: Yes, you would, but under the current – the proposed rule the trial court would be – maintain those exhibits until the time for the claim of appeal.

CHIEF JUSTICE YOUNG: That's what you hope; that's what we would all hope. Thank you.

MS. SPEAKER: Yes, your honor. Thank you.

CHIEF JUSTICE YOUNG: The last speaker on Item 4 which is what we were talking about was – is Michael Mittlestat.

MR. MITTLESTAT: Good morning your honors. Mike Mittlestat of the State Appellate Defender's Office. I'm here to speak in support of the proposed amendment to 7.210(c). Ms. Speaker took a lot of the wind out of sails because a lot of things that she informed the Court were pretty much my sentiments on the issue. I think this rule change recognizes that trial courts are courts of record, that exhibits are part of that record, and that the

record ought to remain intact as much as practical. And that this system of allowing essential parts of the court record to leave the court and then sort of have to boomerang back to the trial court doesn't – doesn't really take that into account and doesn't (inaudible) the integrity of the court.

CHIEF JUSTICE YOUNG: You're addressing Item 3, right, 2010-25.

MR. MITTLESTAT: Yes. To address Justice Kelly's question about making a distinction between criminal appeals and civil cases, for my selfish reason as a SADO attorney I would be perfectly fine with that. I think the Appellate Practice Section, the civil attorneys who handle these appeals would probably want a broader rule, but for my purposes that would be fine to make a distinction between criminal and civil cases.

CHIEF JUSTICE YOUNG: You were here endorsed on Item 4; do you care to speak to that?

MR. MITTLESTAT: I'm sorry I – maybe my email to the clerk was not clear, I did intend to speak to the 7.210(c) amendment.

CHIEF JUSTICE YOUNG: Okay. All right.

MR. MITTLESTAT: Just you know if I could just relay an anecdotal experience that I had recently. I got a file that had – obviously had no exhibits which is par for the course. The case you know several witnesses that had appeared but the case had also been adjourned several times. There were probably 30 copies of subpoenas in the court record from the various witnesses and the various amended adjourned trial, but no exhibits. And so here I am sitting there with you know 30 copies of subpoenas in there, but no exhibits. I – there was a 911 recording that I needed that was admitted as an exhibit at trial – couldn't get ahold of the defense attorney. We contacted the prosecutor because it was a prosecutor exhibit, the prosecutor said sorry, we fulfilled our duties by giving the discovery to your – the defense attorney, so get ahold of him it's not our problem. A couple of days later the trial attorney did follow through and sent us his file and there was a 911 recording in it. The problem is is that the 911 recording had no exhibit label on it and there was a discussion at trial about redaction – removing prejudicial information from that. So I had no idea of knowing whether this recording is – what was – what the jury heard. I'd no idea of knowing that – what really

is the record of sufficient completeness that I'm entitled to as a criminal appellant.

CHIEF JUSTICE YOUNG: How would that change if the recording had been in the file to the court?

MR. MITTLESTAT: Because the redacted recording or the redacted transcript with the exhibit label on it would be in the court's possession and it would be part of the record.

CHIEF JUSTICE YOUNG: Thank you.

MR. MITTLESTAT: Thank you.

CHIEF JUSTICE YOUNG: That concludes – there being no more speakers on the items on the public agenda, our public administrative hearing is concluded. Thank you.